Supreme Court, U.S.
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No. 991178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Solid Waste Agency of Northern Cook County, which comprises 23 Cook County, Illinois municipalities, acquired a 500-acre-plus site to construct an urgently needed balefill facility to dispose of its communities' non-hazardous solid waste. Petitioner's plans called for filling some 17 acres of permanently or seasonally wet depressions left by earlier strip mining operations. The U.S. Army Corps of Engineers twice informed petitioner that it had no jurisdiction over the site, then abruptly changed its mind on the sole basis that the isolated waters on the site were used by migratory birds. The Corps relied on its so-called "migratory bird rule," which interprets the Clean Water Act to reach isolated intrastate waters that do or potentially could serve as habitat for migratory birds. Because the Corps asserted jurisdiction, petitioner was required to apply for a permit to fill the waters on the site pursuant to Section 404 of the Clean Water Act. The Corps denied petitioner's permit application, thereby destroying a significant municipal public works project important to some 700,000 local residents.

The question presented in this case, as to which the courts of appeals are in conflict, is as follows:

Whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds.

RULES 29.6 AND 14.1 STATEMENT

Petitioner is the Solid Waste Agency of Northern Cook County, a municipal corporation created by intergovernmental agreement under the laws of Illinois. Its member communities are the cities and villages of Arlington Heights, Barrington, Buffalo Grove, Elk Grove Village, Evanston, Glencoe, Glenview, Hoffman Estates, Inverness, Kenilworth, Lincolnwood, Morton Grove, Mt. Prospect, Niles, Palatine, Park Ridge, Prospect Heights, Rolling Meadows, Skokie, South Barrington, Wheeling, Wilmette, and Winnetka. SWANCC has no parent corporations and no subsidiaries, wholly-owned or otherwise.

Respondents are the U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency; Arthur Williams, Lieutenant General, Chief of Engineers, U.S. Army Corps of Engineers; Robert E. Slockbower, Lieutenant Colonel, Chicago District Engineer, U.S. Army Corps of Engineers; Togo D. West, Jr., Secretary of the Army; Carol M. Browner, Administrator, U.S. Environmental Protection Agency; and intervenors below, the Village of Bartlett and Citizens Against the Balefill.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Solid Waste Agency of Northern Cook County respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 191 F.3d 845. The opinion of the district court (App., *infra*, 14a-36a) is reported at 998 F. Supp. 946. The U.S. Army Corps of Engineers' decision denying petitioner's revised Section 404 permit application is set out at Pet. C.A. App. 85-171 (decision) and U.S. C.A. App. 29-189 (appendices).

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1999. On December 16, 1999, Justice Stevens extended the time for filing the petition for certiorari to and including January 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution provides in relevant part that "Congress shall have Power * * * To regulate Commerce * * * among the several States." U.S. CONST. art. I, § 8.

The relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1344(a) and 1362(7), are reproduced at App., *infra*, 37a-38a. The pertinent regulation, 33 CFR § 328.3(a)(3) (the "other waters rule"), and preamble to 51 Fed. Reg. 41,206 (1986) (the "migratory bird rule"), are reproduced at App., *infra*, 39a-40a.

STATEMENT

The issue in this case is whether, pursuant to the Clean Water Act ("CWA" or "Act"), the U.S. Army Corps of Engineers ("Corps") properly has jurisdiction over isolated waters that are not navigable and not connected or adjacent to navigable waters, but that do or could provide habitat for migratory birds. The Corps has asserted such jurisdiction in this case and others through its "migratory bird rule" (App., *infra*, 40a), which interprets the navigable "waters of the United States" subject to the CWA to include all waters that are an actual or potential habitat for migratory birds.

The Corps' unprecedentedly broad claim of jurisdiction has caused sharp disagreement among the courts of appeals. The Fourth Circuit has rejected the Corps' jurisdictional grab as contrary to the text of the CWA and constitutionally impermissible. *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997). The Seventh and Ninth Circuits, in contrast, have upheld the Corps' authority. App., *infra*, 1a-13a; *Leslie Salt Co.* v. *United States*, 55 F.3d 1388 (9th Cir. 1995) (*Leslie Salt II*). Even the Ninth Circuit, however, recognized that "[t]he migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Id.* at 1396. Mirroring this circuit split, Justice Thomas and a number of appellate judges have criticized the Corps' position in individual concurrences and dissents. *Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari); see *infra*, pp. 12-13.

The Seventh Circuit's ruling in this case is legally erroneous. The notion that the Corps has jurisdiction over isolated intrastate waters based merely on the actual or potential presence of migratory birds is inconsistent with the plain language and legislative history of the CWA. The migratory bird rule also raises substantial constitutional concerns under the Commerce Clause, which mandate a

narrower reading of the Act to avoid the constitutional difficulty. In those circumstances, the Corps' migratory bird rule is entitled to no deference under *Chevron*, and it should be set aside.

Given the split among the circuits and the statutorily and constitutionally untenable basis of the Corps' assertion of jurisdiction, it is time for this Court to address the question presented. Review of the Corps' migratory bird rule in *this* case is *especially* appropriate and necessary. The Corps' unfounded claim of jurisdiction has brought to an abrupt halt the coordinated efforts of 23 municipalities to address the important local problem of the disposal of solid waste generated by their 700,000 citizens, derailing a vital, $20-million-plus public project. Cooperative, multi-municipality efforts to address common local issues are not properly matters for federal control. Yet so expansive is the migratory bird rule that it is difficult to imagine any significant state or municipal project (or private development) that would not require the Corps' approval.

Beyond that, the ubiquitous presence of migratory birds, which number in the billions, means that land-use matters traditionally subject to local control are now dependent upon federal approval by the Corps sitting as a sort of super zoning body determining the "public interest." That federalization of local land-use matters is not what Congress had in mind when it adopted the CWA, and the Commerce Clause does not permit it.

A. The Statutory And Regulatory Scheme

The CWA prohibits the discharge of "pollutants," including dredged and fill materials, into "navigable waters" without a permit from the Corps. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). "Navigable waters" are defined in the CWA only as "the waters of the United States." § 1362(7).

The Corps has defined the "waters of the United States" in regulations to include not only navigable waters, tidal waters, and waters adjacent to such waters, but also

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce * * *.

33 CFR § 328.3(a)(3) (1998), App., *infra*, 39a.[1]

In the preamble to regulations promulgated in 1986, the Corps further defined these "other" waters:

> EPA has clarified that waters of the United States at [33] CFR 328.3(a)(3) also include the following waters:
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines * * *.

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986), App., *infra*, 40a. It is the Corps' reliance on this "migratory bird rule" —which the Corps never promulgated in accordance with Section 553 of the Administrative Procedure Act and which therefore has never been subject to notice and comment[2]—that petitioner challenges as a legally improper basis for federal jurisdiction over petitioner's proposed balefill site.

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[1] The Environmental Protection Agency has issued an identical definition, 40 CFR § 230.3(s), which is not directly at issue here.

[2] See *Tabb Lakes Ltd.* v. *United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988) (the migratory bird rule is invalid as a substantive rule promulgated without notice and comment), aff'd, 885 F.2d 866 (4th Cir. 1989).

B. SWANCC's Balefill Project And The Corps' Exercise Of Jurisdiction

The Solid Waste Agency of Northern Cook County ("SWANCC") is a municipal corporation comprised of 23 municipalities located in northern and northwestern Cook County, Illinois. SWANCC was formed to develop a system for the safe and efficient disposal of non-hazardous municipal waste for the approximately 700,000 people who live in its member communities. As part of its mission, SWANCC proposed to locate and develop a site for disposal of that waste. App., *infra*, 2a.

SWANCC purchased a 533-acre parcel of land to create a balefill—a landfill where baled, rather than loose, waste is dumped—on 410 acres of the site located exclusively in Cook County. Part of the balefill site was agricultural land and part, 298 acres, an "early successional stage forest" that had grown up on land previously used as a strip mine for gravel. The forested portion of the site contained "a labyrinth of trenches and other depressions" left by the strip mining. These trenches and depressions collect rainwater during some or all of the year, forming "permanent or seasonal ponds" ranging from one-tenth of an acre to several acres in size, and from a few inches to several feet in depth. App., *infra*, 2a.

In 1987, after ten public hearings and 2,500 pages of testimony, the local zoning board and the Cook County Board of Commissioners approved SWANCC's balefill project. Pet. C.A. App. 54. In 1989, SWANCC further obtained a permit for the project from the Illinois Environmental Protection Agency, which had reviewed SWANCC's 1,700 page application and conducted four days of hearings. *Id.* at 50-51, 55-56. Because SWANCC planned to fill 17.6 acres of trenches and depressions within the forested area to construct the balefill, it also requested rulings from the Corps of Engineers as to whether it required a permit under Section 404 of the CWA, 33 U.S.C. § 1344(a). After conducting an on-site

inspection, the Corps informed SWANCC in 1986 and again in 1987 that those 17.6 acres were not subject to the Corps' regulatory authority over "navigable waters" and that a Section 404 permit was not required. App., *infra*, 3a-4a, 16a.

The Corps changed its position after the Illinois Nature Preserves Commission informed the Corps in July 1987 that its staff had observed migratory bird species on the property during a brief site visit. App., *infra*, 4a. Based on that assessment, and invoking its "migratory bird rule," the Corps concluded that the isolated, intrastate strip-mining depressions on the balefill site were "navigable" "waters of the United States" within its jurisdiction under the CWA because they "are used or would be used as habitat by other migratory birds which cross state lines." *Ibid.*

In response to the Corps' assertion of jurisdiction, SWANCC submitted an application for a Section 404 permit, which the Corps denied in 1991. The Corps also denied SWANCC's revised application in 1994. App., *infra*, 4a.[3]

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[3] The court of appeals incorrectly assumed the Corps had determined that migratory birds actually used waters on the balefill site as habitat. App., *infra*, 10a. To be sure, the Corps stated, in denying SWANCC's permit application, that "the water areas are used as habitat by migratory bird[s] which cross state lines." But it did so based not on any recorded observation of birds using the water areas as habitat, but based solely on the fact that thirteen species of migratory birds observed at least once on the 533-acre site "are known to depend on aquatic environments for a significant portion of their life requirements." Pet. C.A. App. 78; see also *id.* at 94, 780-781. Nothing in this case turns, however, on whether the balefill site was actually or only potentially habitat for migratory birds. Though the extension of federal jurisdiction to wet areas that *might* be used by migratory birds may be even more statutorily and constitutionally problematic, there is no basis for jurisdiction over actual habitat either.

C. SWANCC's Challenge To The Migratory Bird Rule And The District Court's Ruling

In December 1994, SWANCC brought suit against the Corps in the District Court for the Northern District of Illinois. SWANCC challenged both the merits of the Corps' decision and the theory under which it asserted jurisdiction. Both sides moved for summary judgment on the issue of jurisdiction, and, on March 25, 1998, the district court granted summary judgment for the Corps on that question. App., *infra*, 14a.

The district court rejected SWANCC's contention that the migratory bird rule exceeds the bounds of the Corps' authority to define "navigable waters" and "waters of the United States." The court recognized that "the Fourth Circuit reached the opposite conclusion in *United States* v. *Wilson*." App., *infra*, 30a. But it "decline[d] to follow" *Wilson*, holding that the migratory bird rule is justifiable because one purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at 29a, quoting 33 U.S.C. § 1251(a).

The district court also rejected SWANCC's argument that the Commerce Clause and *United States* v. *Lopez*, 514 U.S. 549 (1995), bar the migratory bird rule and require the statute to be read more narrowly. App., *infra*, 30a-31a. Distinguishing *Wilson* and *Lopez*, the court relied on prior circuit precedent and *Leslie Salt II* to conclude that the "commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Ibid.*; see also *id.* at 17a-24a. Subsequently, SWANCC dismissed the remainder of its claims and the district court entered final judgment for the Corps. *Id.* at 2a.

D. The Seventh Circuit's Decision

The Seventh Circuit affirmed. It first rejected SWANCC's argument that the migratory bird rule violates the Commerce Clause, or at least raises enough constitutional problems to mandate a narrow interpretation of "navigable" "waters of the United States." App., *infra*, 5a-9a. The court acknowledged that the migratory bird rule can be justified, if at all, only under the third prong of federal regulatory power set forth in *Lopez*: "regulation of activities that 'substantially affect' interstate commerce." *Id.* at 5a, quoting 514 U.S. at 558-559. It then held that although the Corps had made no showing that the use of SWANCC's balefill site by migratory birds had any effect on interstate commerce, "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." App., *infra*, 6a. Finally, the court held that "destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce" because "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," including by "trave[l] across state lines." *Id.* at 7a.

Turning to SWANCC's argument that the migratory bird rule is not a permissible interpretation of the CWA, the court of appeals held that the "scope of the Act reaches as many waters as the Commerce Clause allows." Accordingly, it concluded, "because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the * * * Corps to interpret the Act in such a manner." App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the circuits are split as to the jurisdictional reach of the CWA, and because the Seventh Circuit reached a decision in this case that is

erroneous as a matter of statutory interpretation and constitutional law and seriously infringes on prerogatives reserved to States and municipalities in our system of federalism.

I. THE CIRCUITS ARE SPLIT OVER THE CORPS' AUTHORITY TO REGULATE ISOLATED INTRASTATE WATERS BASED ON THEIR ACTUAL OR POTENTIAL USE BY MIGRATORY BIRDS

In *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 129 (1985), this Court upheld the Corps' construction of the Clean Water Act to cover not only "navigable or interstate waters and their tributaries" but also wetlands *"adjacent"* to such waters. (Emphasis added). This Court reserved and did "not express any opinion" regarding the Corps' much more ambitious claim of authority "to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water"—referencing specifically the Corps' claim in 33 CFR § 328.3(a)(3) to have jurisdiction over "other waters * * * the use, degradation or destruction of which could affect interstate commerce." 474 U.S. at 131 n.8. The courts of appeals have disagreed about the question reserved in *Riverside Bayview Homes*, including about the very furthest reach of the Corps' assertion of jurisdiction over "other waters," the migratory bird rule.

1. The Fourth Circuit in *Wilson* held "invalid" the Corps' "other waters" regulation, 33 CFR § 328(a)(3)—the regulation that the migratory bird rule expressly purports to "clarif[y]" (App., *infra*, 39a)—on the ground that it "exceeded [the Corps' regulatory power] under the Clean Water Act." 133 F.3d at 257. Had Congress enacted § 328(a)(3) as a statute, the court pointed out, "it would present serious constitutional difficulties * * * under the Commerce Clause," because it "requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate waters." *Ibid.* But, the court held, because the other

waters regulation "is not a statute," "[a]bsent a clear indication to the contrary, we should not lightly presume that merely by defining 'navigable waters' as 'the waters of the United States,' * * * Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner." *Ibid.*

In addition to identifying constitutional difficulties with the Corps' claim to jurisdiction over "other waters," the Fourth Circuit held that § 328(a)(3) "expands the statutory phrase 'waters of the United States' beyond its definitional limit." 133 F.3d at 257. "[A]s a matter of statutory construction," the Fourth Circuit held, "one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to interstate or navigable waters." *Ibid.*

The Seventh Circuit thought *Wilson* irrelevant for two reasons, both mistaken. First, *Wilson* "involved a challenge to 33 C.F.R. § 328(a)(3)," while SWANCC "limited its objections to the propriety of the migratory bird rule as an interpretation of" § 328(a)(3). App., *infra*, 10a. Obviously, however, the Fourth Circuit would not, under its reasoning, uphold an *interpretation* or *clarification* of the very regulation it held invalid: *Wilson* effectively struck down not just § 328(a)(3), but also the migratory bird rule. That is especially clear because the migratory bird rule even more broadly interprets "waters of the United States" than the underlying regulation. Instead of requiring a connection or potential connection with *interstate commerce*, like the regulation, the rule only requires a connection or potential connection with *migratory birds* that are "protected by Migratory Bird Treaties" or "cross state lines." App., *infra*, 40a.

Second, the Seventh Circuit pretended that the *Wilson* ruling was limited to the question whether "Congress may regulate waters based on their *potential* to affect interstate

commerce." App., *infra*, at 10a. As the quotations from *Wilson* set out above show, *Wilson* cannot be so narrowly cabined. The Fourth Circuit struck down the "other waters" rule because it does not require a showing of a "substantial effect on interstate commerce" or a "nexus" with navigable or interstate waters. 133 F.3d at 257. Unsurprisingly, since it is solely an interpretation of § 328(a)(3), the migratory bird rule does not require a showing of a substantial effect on interstate commerce or any nexus with navigable or interstate waters either. The Fourth Circuit's Commerce Clause analysis thus applies equally to the migratory bird rule. The Seventh Circuit also simply ignored the alternative *statutory* basis for the *Wilson* decision. *Ibid.* Without doubt, the Fourth Circuit holds the migratory bird rule, as well as the regulation it interprets, beyond the Corps' statutory authority because it requires no connection to navigable or interstate waters or waters closely related thereto.

Wilson cannot be distinguished, and it is flatly at odds with the Seventh Circuit's decision in this case that the migratory bird rule is constitutionally unproblematic and statutorily authorized, as well as with the similar decisions of other circuits. See *Leslie Salt Co.* v. *United States* (*Leslie Salt I*), 896 F.2d 354, 360 (9th Cir. 1990) ("The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species"); *Utah* v. *Marsh*, 740 F.2d 799, 803-804 (10th Cir. 1984) (upholding Corps jurisdiction over intrastate lake because its waters were used for fisheries and to irrigate crops which were subsequently marketed interstate, it was visited by out-of-state tourists, and it was on migratory bird flyways).

Had SWANCC's balefill been located in the Fourth Circuit, the result in this case would certainly have been different. This Court should not tolerate a circuit split on an issue as important as the scope of federal jurisdiction under national legislation like the Clean Water Act. Municipalities

and other landowners are entitled to consistent treatment under the CWA throughout the country; the fate of their projects should not turn on the happenstance of where their land is located. And the need for national uniformity is especially great because anyone planning to dredge or fill waters within the Corps' jurisdiction must obtain a permit or risk facing *criminal sanctions*. See, *e.g.*, *Wilson*, 133 F.3d 251 (criminal convictions at issue). Whether an act is a federal crime or not should not depend on where in the country the act takes place.

2. Justice Thomas questioned the validity of the Corps' migratory bird rule in his dissent from the denial of certiorari to review the *Leslie Salt II* decision. He stated that the issue presented in that case—as here—"raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the Clean Water Act." *Cargill, Inc.* v. *United States*, 516 U.S. 955, 959 (Thomas, J., dissenting from denial of certiorari).

Justice Thomas observed that "[t]he basis asserted to create federal jurisdiction over petitioner's land"—"the actual or potential presence of migratory birds on petitioner's land" —is "even more far-fetched than that offered, and rejected, in *Lopez*." 516 U.S. at 957-958. Justice Thomas described as "improper" the Corps' "assumption * * * that the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction." *Id.* at 958. He observed that in *Leslie Salt*, as here, the Corps made "no showing that humans ever went to petitioner's property to hunt, trap, or observe migratory birds," or "that the cumulative effect of land use involving * * * wholly isolated [waters] would have a substantial effect on interstate commerce." *Id.* at 959. There was, in short, absolutely no explanation how "the activity on the land to be regulated * * * substantially affect[ed] interstate commerce." *Ibid.*

Justice Thomas concluded that the migratory bird rule "likely stretches Congress' Commerce Clause powers beyond breaking point" and expressed, "[i]n light of *Lopez*, * * * serious doubts about the propriety of the Corps' assertion of jurisdiction over petitioner's land." 516 U.S. at 958.

Although Justice Thomas' position did not garner four votes to review the *Leslie Salt II* decision, review of the migratory bird rule has since become more urgent with the Fourth Circuit's 1997 rejection of the Corps' jurisdiction over "other waters" in *Wilson*.

3. Circuit judges have been equally critical of the "other waters" and migratory bird rules in individual opinions. In his concurrence in *Hoffman Homes, Inc.* v. *United States Envtl Protection Agency*, 999 F.2d 256, 262-263 (7th Cir. 1993), for example, Judge Manion concluded both that the CWA gives no federal jurisdiction over "isolated wetlands" that "have no effect on the waters of the United States," and that even if it did, "the Commerce Clause does not empower Congress to regulate isolated wetlands * * *. To hold otherwise would be, in effect, to hold that Congress' power under the Commerce Clause is virtually limitless." *Id.* at 263; see also *ibid.* ("The commerce power as construed by the courts is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink").[4] Judge Rymer, in her separate opinion in *Leslie Salt I*, was likewise unimpressed with the legal basis for the Corps' migratory bird rule. *Leslie Salt I*, 896 F.2d at 361 n.1 (Rymer, J., concurring in part and dissenting in part); see also *United States* v. *Larkins*, 852 F.2d 189, 193-194 (6th Cir. 1988) (Merritt, J., concurring);

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[4] Judge Manion's analysis is more fully set forth in his subsequently vacated opinion for the Seventh Circuit in *Hoffman Homes, Inc.* v. *United States Envtl Protection Agency*, 961 F.2d 1310 (7th Cir. 1992).

Leslie Salt II, 55 F.3d at 1396 ("The migratory bird rule certainly tests the limits of Congress' commerce powers and, some would argue, the bounds of reason").

It is no surprise, given these disagreements, that the Corps' jurisdictional grab has also drawn considerable scholarly attention. By and large, commentators recognize that the Corps' exercise of jurisdiction over "isolated waters" and migratory bird habitat pushes the edges (at the very least) of federal Commerce Clause power. *E.g.*, Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 185 n.49 (1998) ("Why the fact that a bird or animal crosses state lines of its own volition and without being itself an object of interstate commerce is sufficient for Commerce Clause purposes remains unexplained").[5]

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[5] See also, *e.g.*, Gilbert, *The Migratory Bird Rule After* Lopez: *Questioning the Value of State Sovereignty in the Context of Wetland Regulation*, 39 WM. & MARY L. REV. 1695, 1696 (1998) (noting "concerns" regarding the validity of the migratory bird rule "in view of the *Lopez* decision"); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 414 (1998) (isolated wetland regulations "will be susceptible to Commerce Clause attack because they are indefensible as proper regulations of 'commerce' under any untortured definition of the word"); Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U.L. REV. 931, 950 (1997) (explaining that in light of *Lopez*, the migratory bird rule "could be in jeopardy"); Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVT'L L. & POLICY FORUM 321, 351 (1997) ("A rule permitting jurisdiction to be determined solely by potential use of a wetland by migratory birds is arguably too tenuously connected to interstate commerce to trigger the commerce power in light of *Lopez*'s substantiality requirement"); Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. DAVIS L. REV. 1237, 1267 (1995) ("It is unreasonable to argue that the potential use of an isolated wetland by any species of migratory bird substantially affects interstate commerce"); Bablo, Leslie Salt Co. v. United States: *Does the Recent Supreme Court Decision in* United States v. Lopez *Dictate the Abrogation of the "Migratory Bird Rule"?*, 14 TEMP. ENVT'L L. & TECH. J. 277, 278 (1995) ("the very tenuous tie between migratory birds and interstate commerce does not satisfy the tests of the Commerce Clause enunciated in *Lopez*"); Lessner, Leslie Salt Co. v. United States: *Keep the Birds Out of Your Birdbath: It May Be Considered The Jurisdiction of the Army Corps of Engineers as a "Water of the United States,"* 2 VILL. ENVT'L L.J. 463, 500 (1991) (expressing doubt that a migratory bird habitat "can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction").

Beyond the clear circuit split with *Wilson*, the separate opinions by Justice Thomas and others and the wealth of critical academic commentary demonstrate the diversity of views on the propriety of the migratory bird rule and show that confusion in this area will continue and likely escalate absent this Court's immediate intervention.

II. THE MIGRATORY BIRD RULE IS AN IMPERMISSIBLE INTERPRETATION OF THE CWA

The Seventh Circuit's decision to defer to the Corps' interpretation of the Clean Water Act is incorrect. Courts properly defer to an agency's interpretation of a statute "only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508 (1992). A court "ascertains [whether] Congress had an intention on the precise question at issue" by "employing traditional tools of statutory construction," including analysis of the text, structure, "history and policy of the Act." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 , 843 n.9, 862 (1984). Applying that familiar

standard, the migratory bird rule is invalid. It is inconsistent with the language and history of the CWA, and it fails to pass muster under established canons of interpretation requiring that a statute be construed to avoid raising serious constitutional questions and to avoid impinging on areas traditionally regulated by the states.

A. The Plain Language of the Act Requires Jurisdictional Waters To Be Related To Navigable Waters

The plain language of the CWA prohibits discharges into "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1344(a), 1362(7). The Corps and the court below played favorites with these terms, ignoring the phrase "navigable waters" and focusing exclusively on the phrase "waters of the United States." App., *infra*, 9a. But "'[j]udges should hesitate * * * to treat [as surplusage] statutory terms in any setting.'" *Bailey* v. *United States*, 516 U.S. 137, 145 (1995). The statutory phrases "navigable waters" and "waters of the United States" are *both* essential to divining congressional intent. The former concept, properly understood, forecloses the Corps' migratory bird rule.

1. "Navigable waters" is a term of art that traditionally meant "waters navigable in fact" (*The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)), but that was refined over time to include those waters capable of navigation through reasonable improvements. *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 298-299 (1940); see BLACK'S LAW DICTIONARY 1179 (4th ed. 1968); *Gilbert* v. *United States*, 370 U.S. 650, 655 (1962) (statutory terms are generally to be given their established common law meaning). No one asserts that the gravel-mining depressions on SWANCC's property are navigable in either sense.

2. The Seventh Circuit ignored this settled common-law meaning of "navigable waters" and treated that statutory phrase as surplusage. It justified that approach by pointing to the CWA's definition of "navigable waters" as the "waters of the United States," then treating *that* phrase as the sole source of limits on the Corps' jurisdiction. App., *infra*, 9a.

It was error for the court of appeals to write the phrase "navigable waters" out of the CWA. In fact, the meaning of the phrase "waters of the United States," while somewhat broader than "navigable waters," is informed by and *incorporates the idea of navigability*. As this Court has held, the phrase means those waters which "form in their ordinary condition by themselves, or by uniting with other waters, *a continued highway over which commerce is or may be carried on* with other States or foreign countries *in the customary modes in which such commerce is conducted by water*." *The Daniel Ball*, 77 U.S. at 563 (emphasis added); see also *The Montello*, 87 U.S. (20 Wall.) 430, 443 (1874).

Thus, as the Fourth Circuit explained in *Wilson*, "the phrase 'waters of the United States' when used to define the phrase 'navigable waters'" naturally "refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." 133 F.3d at 257. The migratory bird rule, like the regulation it purports to interpret, "defines 'waters of the United States' to include waters that need have nothing to do with navigable or interstate waters," and deserves no deference because it "expands the statutory phrase 'waters of the United States' beyond its definitional limit." *Ibid.*

3. The Seventh Circuit's reliance on this Court's decision in *Riverside Bayview Homes* as support for its interpretation of the CWA is misplaced. This Court explained in *Riverside Bayview* that Congress' use of the phrase "waters of the United States" in the CWA evidences an intent to "regulate at least *some* waters that would not be deemed 'navigable' under the classical understanding," and in that sense (only), the concept of navigability "is of limited import" in the CWA. *Riverside Bayview Homes*, 474 U.S. at 133 (emphasis added). Nowhere, however, has this Court suggested that the

Corps can ignore altogether the concept of navigability, as it does in its "other waters" and migratory bird rules.

To the contrary, in stark contrast to Corps' sweeping definition of "waters of the United States," the definition this Court found reasonable in *Riverside Bayview*—navigable waters and their "adjacent wetlands"—does accord with the traditional interpretation of "waters of the United States" as a "continued highway for commerce." "Adjacent wetlands" abut navigable waters, thus forming a "continued highway" and becoming "waters of the United States." *The Daniel Ball*, 77 U.S. at 563; *The Montello*, 87 U.S. at 443; see also *DeLovio* v. *Boit*, 7 F.Cas. 418, 423 (Cir. Ct., D.Mass. 1815) (Storey, J.) ("marsh land, bordering on the sea" may be within the admiralty jurisdiction). Isolated, man-made depressions that fill with rainwater are not remotely similar. Thus, *Riverside Bayview* provides no support for the extraordinary extension of federal jurisdiction over local land use approved by the Seventh Circuit.

4. The only statutory analysis engaged in by the court below was its iteration of the purpose of the Act, which includes the phrase "biological integrity" and the goal of ensuring "water quality which provides for the protection and propagation of * * * wildlife." App., *infra*, 10a. But "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action * * * and, in the end, prevents the effectuation of congressional intent." *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986).

In contrast to the highly generalized purposes of the Act relied on by the Seventh Circuit, the CWA's text is specific and transparently clear. When it enacted the CWA, Congress was no stranger to the terms "navigable waters" and "waters of the United States," including their common law meanings and alternatives. It had previously used both concepts "to

determine the extent of the authority of the [Corps] under the Rivers and Harbors Appropriation Act of 1899," 33 U.S.C. § 403. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979). Congress' choice to use those well-understood terms to define the scope of the CWA should not be treated lightly, and it supports the Fourth Circuit's view of the Corps' jurisdiction, not the Seventh Circuit's interpretation.

Equally telling, in the Federal Power Act Congress gave an agency authority over activities not only on "navigable waters," but also on streams *"other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States."* 16 U.S.C. § 817 (emphasis added).[6] It follows that "Congress knew how to draft a statute to reach" all nonnavigable waters over which Congress has Commerce Clause jurisdiction. *Bailey*, 516 U.S. at 150. That Congress used no similar language in the CWA indicates that, contrary to the ruling below, it did not intend the CWA to apply so broadly.

B. Legislative History Confirms That Congress Did Not Intend The Corps To Base Jurisdiction Merely On The Presence Of Migratory Birds

This Court will not defer to an agency construction where "the legislative history of the enactment shows with sufficient clarity that [it] is contrary to the will of Congress." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 233 (1986). Such is the case here.

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[6] It is noteworthy that even under the broadly worded Federal Power Act, this Court has refused to extend congressional authority to "intrastate nonnavigable waters which do not flow into any navigable streams." *Federal Power Comm'n* v. *Union Elec. Co.*, 381 U.S. 90, 97 & n.9 (1965).

1. Section 404(a) and the definition of "navigable waters" as "waters of the United States" originated in the Federal Water Pollution Control Act Amendments of 1972. In the thousands of pages of legislative history of those amendments, isolated waters are mentioned not once. Neither the government nor the court below has produced a single such reference. Yet the extension of federal jurisdiction to isolated waters implicates many millions of acres. Given the important policy and political interests at stake in drawing the boundary line between federal and local control of development, such a vast expansion of federal authority over heretofore local concerns would hardly have passed in silence.

Congressional statements about the language that was used in the statute—"navigable waters" and "waters of the United States"—reflect established common law definitions. See 118 CONG. REC. H33,756 (1972) (statement of Rep. Dingell, House floor manager); *id.* at H33,699 (statement of Sen. Muskie, Senate floor manager). By defining "navigable waters" as "waters of the United States," the legislative history shows, Congress merely sought to avoid giving "navigable waters" its most "limited" or "technical" meaning—navigable in fact—"derived from the *Daniel Ball* case." *Id.* at H33,756 (Rep. Dingell). Congress wanted a definition "in line with more recent judicial opinions" that "expanded that limited view of navigability * * * to include waterways which would be 'susceptible of being used * * * with reasonable improvement,' as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera." *Ibid.*, quoting *United States* v. *Utah*, 283 U.S. 64, 72 (1931). See also *ibid.* (Rep. Dingell quotes cases, which all involve waters previously or currently obstructed to navigation). In other words, the text was designed to reference the broader definitions of "navigable waters" and "waters of the United States" established by this Court. See also 118 CONG. REC. H33,699 (statement of Sen. Muskie).

In light of these explanations, the statement in the House and Senate conference reports that "[t]he conferees fully intend that *the term 'navigable waters'* be given the broadest possible constitutional interpretation" is clear. S. REP. No. 92-1236, 92d Cong., 2d Sess. 144 (1972) (emphasis added); see also H.R. REP. No. 92-911, 92d Cong., 2d Sess. 131 (1972). Congress simply meant that the CWA should reach waters capable of *navigation* by reasonable improvement, consistent with this Court's decisions in cases such as *Appalachian Electric* and *United States* v. *Utah*. It does *not* mean, as the Seventh and Ninth Circuits have held, that the CWA "reaches as many *waters* as the Commerce Clause allows." App., *infra*, 9a (emphasis added); *Leslie Salt I*, 896 F.2d at 360. Had that been Congress' intent, it would have said so expressly, as it did in the Federal Power Act.

2. No different message was sent by Congress when, in 1977, it rejected amendments that would have limited the Corps' authority to waters navigable in fact and their adjacent wetlands. This Court concluded in *Riverside Bayview Homes* that Congress' inaction showed that "the scope of the Corps' asserted jurisdiction *over wetlands* was specifically brought to Congress' attention," and that "even those who thought that the Corps' existing authority under § 404 was too broad" recognized that existing legislation should be read to cover *adjacent* wetlands. 474 U.S. at 137-138 (emphasis added). Neither conclusion supports the migratory bird rule.

First, the migratory bird rule was not officially promulgated by the Corps until 1986. 51 Fed. Reg. 41206, 41217 (1986); App., *infra*, 39a. Absent clairvoyance, Congress could not have "acquiesced in the Corps' definition of waters" (474 U.S. at 138) in the migratory bird rule by its failure to act in 1977. See *Leslie Salt I*, 896 F.2d at 361 n.1 (Rymer, J., dissenting) (rejecting argument that Congress acquiesced in the migratory bird rule because "[t]his 1986 addition to, or clarification of, the Corps' regulations was not considered during congressional debates on the [CWA] of

1977"). Second, even the government has not ventured to suggest that "even those who thought that the Corps' existing authority under § 404 was too broad" would comfortably read the existing legislation to cover isolated intrastate depressions visited by migratory birds. Nor could it: the migratory bird rule marks the very furthest extent of asserted federal jurisdiction and is a giant leap beyond the normal bases upon which the federal government inserts itself into local affairs. In sum, the legislative history of Section 404 provides no support for, but contradicts, the migratory bird rule.

C. No Deference Is Owed To The Migratory Bird Rule Because It Raises Serious Constitutional Concerns

1. The migratory bird rule is also entitled to no deference because it raises "serious constitutional concerns" and "there is another interpretation that may fairly be ascribed" to the Act. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988); see also *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (when an agency's "exercise of its jurisdiction * * * would give rise to serious constitutional questions" no deference is owed unless the regulation denotes "the affirmative intention of the Congress clearly expressed"). The Commerce Clause "is subject to outer limits." *Lopez*, 514 U.S. at 557. The migratory bird rule hovers around or exceeds those limits, at minimum raising "serious constitutional questions." Even *defenders* of the migratory bird rule acknowledge that it "tests the limits of Congress' commerce powers, and, some would argue, the bounds of reason." *Leslie Salt II*, 55 F.3d at 1396.

2. The Seventh Circuit recognized that the migratory bird rule can be justified, if at all, only as regulation of an activity that "substantially affect[s]" interstate commerce. App., *infra*, 6a-7a; *Lopez*, 514 U.S. at 558-559. But the court did not rest its decision that the rule is constitutionally unproblematic on a showing by the Corps that filling gravel-mining depressions

on SWANCC's property would "substantially" affect interstate commerce. The terms of the migratory bird rule require nothing more than the particular waters in question "are or would be used" as a habitat by migratory birds that are protected by international treaty or that "cross state lines" (App., *infra*, 40a), and the Corps made no showing beyond that requirement when it determined that SWANCC's balefill property is within its jurisdiction. See App., *infra*, at 6a (acknowledging that any impact on birds on SWANCC's property "has no discernible effect on interstate commerce"). The migratory bird rule's lack of any connection to commerce, reflected in the Corps jurisdictional determination in this case, renders the basis for federal jurisdiction "even more farfetched than that offered, and rejected in *Lopez*" and raises "serious doubts" about the "propriety of the Corps' assertion of jurisdiction." *Cargill*, 516 U.S. at 958 (Thomas, J., dissenting from denial of certiorari).

3. The Seventh Circuit avoided the difficulty that migratory bird use of SWANCC's property has "no discernable effect on interstate commerce" by theorizing that the "cumulative impact" of "the destruction of migratory bird habitat" "substantially affects" interstate commerce in hunting and birdwatching. App, *infra*, 6a-7a.[7] The commerce power may not be extended by that kind of bootstrapping.

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[7] The Seventh Circuit disregarded the fact that there has never been a "showing that the cumulative effect of land use involving * * * *water that is wholly isolated from any water used, or usable, in interstate commerce*" would have a substantial effect on migratory birds, much less "a substantial effect on interstate commerce." *Cargill*, 516 U.S. at 959 (Thomas, J.) (emphasis added). There is no evidence that the numbers of any commercially relevant bird species would diminish as a result of the Corps not regulating isolated waters. The speculative assumption that filling a particular intrastate pond or trench will have a noticeable effect on migratory birds, which in turn will have a substantial effect on commerce, depends on "pil[ing] inference upon inference," an approach rejected in *Lopez*. 514 U.S. at 567.

To be sure, "[w]here the class of activities is regulated and that class is within the reach of federal power" because of its aggregated effect on commerce, "the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971), quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968). But "the *de minimis* character of individual instances * * * is of no consequence" *only* when those instances are "essential part[s]" of "a general regulatory statute" that "bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558. Here, isolated, purely intrastate wet areas are *not* within the class obviously regulated by Congress in the CWA, nor did Congress show any concern in the CWA with migratory birds as a class. And the Corps has never explained how preventing the filling of isolated, intrastate, man-made depressions is "essential" to any goal identified by Congress in the CWA.

The "regulated class" approach to Commerce Clause analysis, which recognizes federal jurisdiction despite the lack of any significant effect on commerce of particular regulated circumstances, should have no application in cases such as this where there is a glaring disconnect between the class covered by the statute ("navigable" "waters of the United States") and the asserted basis of an agency's jurisdiction (migratory birds), and where the agency has failed to show that extending its jurisdiction is essential to the achievement of any statutory goal. See, *e.g.*, *United States* v. *Bird*, 124 F.3d 667, 676 (5th Cir. 1997) (rejecting the government's claim that "Congress need only identify a broad 'class of activities' and determine that, viewed in the aggregate, the class 'substantially affects' interstate commerce," requiring instead the separate incidents be connected to interstate commerce).[8]

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[8] Professor Nagle points out that this Court "has said little about how far Congress can reach in aggregating activities or how one decides what aggregations are permissible." But he notes that the "available clues counsel against overly broad aggregations" like that relied on below: "*Lopez* rejects any Commerce Clause test that every conceivable federal statute could satisfy. The Court's frequently stated concern about federalism pushes toward less sweeping aggregations. And lower courts have rejected the contention that Congress can satisfy the Commerce Clause simply by choosing a broad category of activities whose aggregate effect on interstate commerce is substantial." 97 MICH. L. REV. at 197-198 (footnotes omitted). See also 1 L. TRIBE, CONSTITUTIONAL LAW 825 n.68 (3d ed. 2000) ("*Lopez* leaves unanswered many questions regarding focus and levels of generality [in aggregation] that were raised by *Wickard* and its progeny"). Review in this case would give this Court an opportunity to guide the lower courts in their application of the aggregation principle, which has taken on greater practical significance after *Lopez*.

4. The migratory bird rule contains no "jurisdictional element which would ensure, through case-by-case enquiry" that particular isolated waters "affec[t] interstate commerce." *Lopez*, 514 U.S. at 561. Under the rule, it is enough that the waters "are or would be used as habitat" by any migratory bird. App., *infra*, 40a. Accordingly, the Corps conducted no analysis of the impact on commerce of filling the gravel-mining depressions on SWANCC's balefill site.

5. The basis of the Corps rule and assertion of jurisdiction here appears to be that the self-propelled flight of birds across state or national boundaries alone is enough to implicate the Commerce Clause, allowing regulation of every place where the birds might naturally stop. The ramifications of this assertion are astonishing. Approximately five billion land birds migrate across North America every year, with flyways covering the entire continental United States. THE ATLAS OF BIRD MIGRATION 54-83 (ed. J. Elphick 1995); R. PETERSON, A FIELD GUIDE TO BIRDS 305-370 (4th ed. 1980). By the Corps' rationale, the Commerce Clause would stretch to cover virtually every piece of property in the country,

regardless of its commercial or noncommercial use.[9] As in *Lopez*, "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564.

At the very least, the migratory bird rule raises "serious constitutional concerns." *Edward J. DeBartolo Corp.*, 485 U.S. at 577; see *Cargill*, 516 U.S. at 959 ("This case raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the [CWA] that provide a compelling reason to grant certiorari") (Thomas, J.). Because the Corps' dubious approach lacks support in the text or legislative history, much less the requisite "clearest indication" of congressional support, the Seventh Circuit's deference to the rule cannot be sustained.

D. No Deference Is Owed To The Migratory Bird Rule Because It Impinges On Traditional State Powers

The migratory bird rule also runs afoul the interpretative principle that a court will not assume that Congress intended to substantially "alter sensitive federal-state relationships" by regulating conduct "traditionally subject to state regulation" unless Congress said so clearly. *Rewis* v. *United States*, 401 U.S. 808, 811-812 (1971); see *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (if a federal law is to be read to "radically readjus[t] the balance of state and national

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[9] The government conceded as much at oral argument in *Hoffman Homes*. See 961 F.2d at 1321 n.9 (government conceded that its interpretation would allow it to regulate a puddle visited by migratory birds). See also Holman, *After* United States v. Lopez: *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVT'L L.J. 139, 197 (1995) ("migratory flyways cover the entire United States and, as birdwatchers will attest, migratory birds will alight almost anywhere. Thus the migratory bird rule * * * operates as a limiter-manque—a limiting rule with no limits").

authority," "those charged with the duty of legislating [must be] reasonably explicit").

By vastly expanding federal jurisdiction to include tens of millions of acres of isolated intrastate waters and wetlands —traditionally the exclusive province of the States and their subdivisions—the migratory bird rule drastically alters "sensitive federal-state relationships," making the Corps a sort of super zoning board for all permanently or seasonally wet areas of the United States. Under the migratory bird rule, it is the Corps that ultimately decides whether a project is in the "public interest" (33 CFR § 320.4(a)), supplanting the considered judgments of state and local authorities, as it did in this case. Such a rule was not anticipated by Congress, much less clearly intended, and therefore cannot be sustained.

In light not only of *Lopez*, but also this Court's federalism jurisprudence in recent cases such as last Term's sovereign immunity decisions, *Printz* v. *United States*, 521 U.S. 898 (1997), *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *New York* v. *United States*, 505 U.S. 144 (1992), this Court should demand much clearer authority from Congress before permitting an agency to deprive states and municipalities of their traditional police powers over the use of land so ephemerally connected to interstate commerce. "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden* v. *Maine*, 119 S. Ct. 2240, 2263 (1999). The Founders likewise understood that the States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere." THE FEDERALIST NO. 39, at 245 (C. Rossiter ed. 1961) (J. Madison).

BFP is instructive. There, this Court rejected an interpretation of the Bankruptcy Code that would have preempted state foreclosure law. The Court explained that the power to ensure the security of titles to real estate "inheres in the very nature of [state] government" and that the construction urged by the government would intrude on "the essential [state] sovereign interest in the security and stability of title to the land." 511 U.S. at 544 & n.8. This Court would not permit an interpretation of the Code that "displace[d] traditional state regulation in such a manner" absent a "'clear and manifest'" statement of congressional intent. *Id.* at 544; see also *Lopez*, 514 U.S. at 567-568 (emphasizing the need to maintain "a distinction between what is truly national and what is truly local").

The same principle governs here. The migratory bird rule allows for intrusive federal land-use regulation that impinges on "the authority of state and local governments to engage in land use planning," which this Court has recognized "as long ago as our decision in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)." *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994). Because land-use decisions are the prerogative of States and their subdivisions, this Court has repeatedly deferred to these interests. See *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 4 (1974); *Village of Euclid*, 272 U.S. at 388; see also *Village of Belle Terre*, 416 U.S. at 13 (Marshall, J., dissenting on other grounds) ("zoning is a complex and important function of the State" which "may indeed be the most essential function performed by local government"). Just as federal courts "do not sit to determine whether a particular housing project is or is not desirable" (*Berman* v. *Parker*, 348 U.S. 26, 32 (1954)), so too should federal agencies forbear from becoming local land-use authorities.

Thus, the text and history of the CWA, together with important principles of statutory interpretation that serve to protect state and local powers from unintended federal interference, all indicate that the Corps' migratory bird rule

is an impermissible construction of the Act that is owed no deference. The Seventh Circuit's contrary decision is erroneous and should be reversed.

III. THE PETITION SHOULD BE GRANTED, NOT HELD FOR *JONES* v. *UNITED STATES*

This Court has granted certiorari in *Jones* v. *United States*, No. 99-5739 (cert. granted Nov. 15, 1999), to decide whether interpreting the federal arson statute to reach intrastate arson of residential property is permissible in light of Commerce Clause constraints on federal power. See Order List, Nov. 15, 1999 (reformulating the question for review as "[w]hether, in light of *United States* v. *Lopez*, * * * and the interpretative rule that constitutionally doubtful constructions should be avoided, * * * [18 U.S.C.] Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is unconstitutional").

It appears likely that in *Jones* this Court will provide guidance as to the effect Commerce Clause concerns should have on the proper interpretation of jurisdictional grants in federal statutes. Stated in the abstract, that issue is of obvious relevance to this case: we contend that Commerce Clause problems raised by the migratory bird rule mean that it is an impermissible construction of the CWA under the established "interpretative rule that constitutionally doubtful constructions should be avoided." Nevertheless, holding this petition for *Jones* would not be useful or appropriate.

To begin with, this case and *Jones* involve very different statutes and entirely different factual bases that are alleged by the United States to provide a sufficient nexus to interstate commerce. There is no reason to believe that this Court's ruling whether a federal arson conviction may be based on the burned residence's receipt of out-of-state gas (and the like) will illuminate whether the presence of migratory birds is a proper basis for CWA jurisdiction. The different language of

the statutes involved, their different regulatory histories, and the vastly different questions whether the supply of natural gas to a residence or use of wet areas by migratory birds are "interstate commerce," suggest that however this Court decides *Jones*, the issue in this petition will remain alive and in urgent need of this Court's review.

The two cases also involve completely different Commerce Clause issues. *Jones* concerns a "case-by-case inquiry" into evidentiary sufficiency under a statutory jurisdictional element. This case raises the wholly different question of when deference is owed to agencies that seek to stretch their own jurisdiction to (or beyond) constitutional limits.

Moreover, the Seventh Circuit made abundantly clear that it regards protecting migratory bird habitat as implicating interstate commerce and sees no constitutionally doubtful interpretation at all in this case. A ruling in *Jones* that Commerce Clause problems are to be avoided by narrowing interpretations of jurisdictional grants would have no impact whatsoever on the Seventh Circuit on remand following a GVR, for the Seventh Circuit sees no conceivable Commerce Clause problem to begin with.

In light of these differences, and because the courts of appeals are in disarray as to an important issue concerning the scope of the Clean Water Act that will not be settled in *Jones*, we urge this Court to grant independent review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2000

APPENDIX

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Defendants-Appellees.

No. 98-2277.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 8, 1999.

Decided Oct. 7, 1999.

Before KANNE, DIANE P. WOOD, and EVANS, *Circuit Judges*.

DIANE P. WOOD, *Circuit Judge*.

This case involves the efforts of a consortium of Illinois municipalities to find a place to dump their trash. The Solid Waste Agency of Northern Cook County ("SWANCC") thought that it had found such a spot in a 533-acre parcel of land straddling Cook and Kane Counties, Illinois. Before its "balefill" could open, however, approximately 17.6 acres of ponds and small lakes located on the parcel had to be filled in. This case presents the question whether the U.S. Army Corps of Engineers ("the Corps"), acting under § 404 of the Clean Water Act ("the Act"), 33 U.S.C. § 1344, had jurisdiction to require SWANCC to obtain a permit for its fill operations. SWANCC initially applied for such a permit, but the Corps denied it. SWANCC then sued, claiming both that the Corps had no business meddling in the matter at all and that it was wrong on the merits. For its part, the Corps claimed jurisdiction under the so-called "migratory bird rule," which interprets the Act as extending to certain intrastate

waters based on their actual or potential use as habitat for migratory birds. (The parties dispute whether this is a mere interpretation of statutory language, or something that should be regarded as a freestanding rule--a point that we discuss later in this opinion. Our use of the common phrase "migratory bird rule" is not intended to suggest a position on that issue.)

The district court granted summary judgment in the Corps' favor on the jurisdictional point. At that point, SWANCC decided voluntarily to dismiss the remainder of its claims, so that the district court could enter a final judgment from which it could appeal. See 28 U.S.C. § 1291. We conclude that the Corps properly asserted jurisdiction in this matter, and we therefore affirm.

I

SWANCC is a group of 23 municipalities that banded together to form a municipal corporation for the purpose of locating and developing a disposal site for nonhazardous waste. It found and purchased the 533-acre site to which we have already referred, from which it hoped to carve out approximately 410 acres for a "balefill"—that is, a landfill where the waste is baled before it is dumped. Approximately 298 acres of the proposed balefill site is what is known as an early successional stage forest. At one time, it was a strip mine, but when the mining operation shut down approximately 50 years ago, a labyrinth of trenches and other depressions remained behind. Over time, the land evolved into an attractive woodland vegetated by approximately 170 different species of plants. What were once gravel pits are now over 200 permanent and seasonal ponds. These ponds range from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth. The forest is also home to a variety of small animals. Most important for our purposes are the 100-plus species of birds that have been observed there. These include many

endangered, water- dependent, and migratory birds. Among the species that have been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp swallows, redwinged blackbirds, tree swallows, and several varieties of herons. Most notably, the site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993.

This litigation arose because the proposed balefill project would require the filling of approximately 17.6 acres of semi-aquatic property within the forested area. Section 404 of the Act prohibits the discharge of fill material into "the navigable waters" without a permit issued by the Secretary of the Army, acting through the Chief of Engineers. 33 U.S.C. § 1344(a). The term "navigable waters" is defined in the statute as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Although the Act itself provides no further explanation of which waters are subject to § 404's requirements, regulations issued by the Environmental Protection Agency ("EPA") and the Corps define the phrase "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3).

In March 1986, SWANCC contacted the Corps to find out if a particular 267-acre parcel within the proposed balefill site included "wetlands" within the meaning of the Act, such that SWANCC would have to obtain a § 404 permit in order to fill it in. After an on-site inspection, the Corps initially decided that the site did not include protected wetlands and therefore did not fall within its regulatory jurisdiction. One year later, in February 1987, SWANCC contacted the Corps to request a determination as to whether a 414-acre parcel of

the site included "wetlands." The Corps again responded in the negative.

The Corps changed its position with regard to its jurisdiction over the balefill site, however, after the Illinois Nature Preserves Commission (a state agency) informed it that a number of migratory bird species had been observed there. This new information made all the difference to the Corps, because of the so-called migratory bird rule. This rule, or interpretive convention, reflects the fact that the definition of "waters of the United States" found in 33 C.F.R. § 328.3(a)(3) has long been understood by the EPA and the Corps to include all waters, including those otherwise unrelated to interstate commerce, "which are or would be used as habitat by birds protected by Migratory Bird Treaties" or "which are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,206, 41,217 (1986) ("1986 preamble"). In a letter to SWANCC dated November 16, 1987, the Corps explained that its two previous determinations that the site did not fall within its jurisdiction were based on its finding that the site did not meet the definition of "wetland." In contrast, the latest determination—that the Corps did have jurisdiction over the site—was based on a different theory entirely. Regardless of wetland status, it now appeared that the aquatic areas of the site "are or could be used as habitat by migratory birds which cross state lines." In response to the Corps' notification that it intended to exercise jurisdiction over the site, SWANCC submitted an application for a § 404 permit. The Corps denied that application, finding that all of the affected waters in the site were in fact used as habitat by migratory birds (and thus were not merely potential habitat). SWANCC then submitted a revised application that was also denied.

At this stage in the litigation, SWANCC has abandoned its challenge to the merits of the Corps' decisions and has instead focused exclusively on its challenge to the migratory

bird rule as a basis for the Corps' jurisdiction. Accordingly, we accept as true the Corps' factual findings with regard to SWANCC's permit application, including the crucial finding that the waters of this site were a habitat for migratory birds.

II

SWANCC offers three arguments to support its position that the Corps had no authority to require it to obtain a permit: (1) Congress lacked the power to grant the Corps regulatory jurisdiction over isolated, intrastate waters based on the presence of migratory birds alone; (2) the Corps exceeded its statutory authority in interpreting the Act to confer jurisdiction as provided by the migratory bird rule; and (3) the migratory bird rule is invalid because it was not promulgated in accordance with the notice and comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.

We begin with the most ambitious of SWANCC's arguments, which is that the migratory bird rule is unconstitutional in light of the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). Prior to *Lopez*, it had been established that Congress' powers under the Commerce Clause were broad enough to permit regulation of waters based on the presence of migratory birds. See, *e.g.*, *Rueth v. EPA*, 13 F.3d 227, 231 (7th Cir. 1993); *Leslie Salt Co. v. United States (Leslie I)*, 896 F.2d 354, 360 (9th Cir.1990). We must decide whether *Lopez* now compels the opposite conclusion.

In *Lopez*, the Court reaffirmed the well-established principle that a federal statute based on the Commerce Clause must serve one of three purposes: (1) regulation of the channels of interstate commerce; (2) regulation or protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce; or (3) regulation of activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558-59, 115 S.Ct. 1624; see also *Hodel v. Virginia*

Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Perez v. United States*, 402 U.S. 146, 150, 91 S.Ct 1357, 28 L.Ed.2d 686 (1971); *United States v. Wilson*, 159 F.3d 280, 285 (7th Cir. 1998). The gun control law at issue in *Lopez*, like the migratory bird rule challenged here, could only have been sustained as an exercise of the third variety of regulatory power. The *Lopez* Court concluded that the statute before it, which made it a crime "knowingly ... [to] possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone" did not meet the "substantially affects" test because (1) it was a criminal statute which, by its terms, had nothing to do with interstate commerce or commercial transactions; (2) it contained no jurisdictional element to ensure that in each case the firearm in question had in fact affected interstate commerce; and (3) Congress had offered no legislative findings to support the conclusion that possessing a gun in a school zone affected interstate commerce. *Lopez*, 514 U.S. at 559-62, 115 S.Ct. 1624; see also *Wilson*, 159 F.3d at 286.

SWANCC urges us to conclude that the migratory bird rule suffers from the same defects. But such a conclusion would overlook important differences between the statute before the Court in *Lopez* and the one we are considering. This court has noted previously that *Lopez* expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce. *United States v. Hicks*, 106 F.3d 187, 189-90 (7th Cir. 1997), citing *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624; see also *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999); *United States v. Thomas*, 159 F.3d 296, 298 (7th Cir. 1998).

This approach, which is most closely associated with the Supreme Court's decision in *Wickard v. Filburn*, 317 U.S.

111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), indicates the relevant legal question for our case is whether the destruction of the natural habitat of migratory birds in the aggregate "substantially affects" interstate commerce. We observed in *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993), that "[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds." *Id.* at 261. Statistics produced by the U.S. Census Bureau reveal that approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds in 1996, and that about 11 percent of them traveled across state lines to do so. Fish & Wildlife Service, U.S. Dep't of the Interior & Bureau of the Census, U.S. Dep't of Commerce, 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 25 (November 1997). Another 17.7 million people spent time observing birds in states other than their states of residence; 14.3 million of these took trips specifically for this purpose; and approximately 9.5 million traveled for the purpose of observing shorebirds, such as herons. *Id.* at 45. There is no need to dally on this point: we find (once again) that the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

SWANCC objects that the migratory bird rule cannot serve to define the Corps' jurisdiction, because the rule excludes nothing. The United States is home to somewhere between 2.5 and 6 billion birds, two-thirds of which migrate. Virtually any body of water could serve as a temporary habitat for at least some of these birds. However, any suggestion that next the Corps will be trying to regulate the

filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it, misses the point. A "habitat" is not simply a place where a bird might alight for a few minutes, as SWANCC suggests, but rather "the place where a plant or animal species naturally lives or grows." Webster's Third New International Dictionary 1017 (1993). Before the Corps may assert jurisdiction under the migratory bird rule, it must first make a factual determination that a particular body of water provides a habitat for migratory birds, which it has done here.

Last, SWANCC offers a broad policy-based argument for rejecting jurisdiction under the migratory bird rule. The rule is, it claims, inconsistent with the principles of federalism that motivated the Court in *Lopez*, because it erodes the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68, 115 S.Ct. 1624. But this argument works only if, as SWANCC asserts, the protection of migratory bird habitat is a matter of local concern only. Once again, that argument is refuted by the numerous international treaties and conventions designed to protect migratory birds, see, *e.g.*, Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, 25 U.S.T. 3331, T.I.A.S. No. 7990 (1972); Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., 50 Stat. 1311, T.S. No. 912 (1936); Convention for the Protection of Migratory Birds, U.S.-Gr. Brit., 39 Stat. 1702, T.S. No. 628 (1916), as well as the case law recognizing the "national interest of very nearly the first magnitude" in protecting such birds, *North Dakota v. United States*, 460 U.S. 300, 309, 103 S.Ct. 1095, 75 L.Ed.2d 77 (1983); see also *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920). Even less persuasive is SWANCC's suggestion that giving a federal agency (here, the Corps) the power to override decisions by local land use and zoning boards to permit the filling of local waters conflicts with notions of state sovereignty. To the

contrary, because the regulation of migratory bird habitat is a permissible exercise of Congress' authority, the Supremacy Clause, U.S. Const. art. VI, cl. 2., squarely supports the legitimacy of giving precedence to federal law in this area.

III

SWANCC next contends that, even if Congress lawfully could have granted the Corps jurisdiction over isolated bodies of water based on the presence of migratory birds, it did not do so. As noted above, the Act expressly limits the Corps' jurisdiction to "the waters of the United States." The EPA and the Corps have defined this term to include "[a]ll other waters ... the use, degradation or destruction of which could affect interstate or foreign commerce." They further have interpreted the phrase "could affect interstate or foreign commerce" as permitting jurisdiction based on the presence of migratory birds. It is this second level of agency interpretation that SWANCC deems excessive.

We review an agency's interpretation of a statute it is charged with administering under the standard outlined in, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The first question is whether the plain meaning of the text of the statute either supports or opposes the regulation. If so, the analysis ends with the court's application of the plain meaning. *Id.* at 842, 104 S.Ct. 2778. But if the statute is either ambiguous or silent on the issue, the court must defer to the agency interpretation so long as it is based on a reasonable reading of the statute. *Id.* at 843, 104 S.Ct. 2778.

It is well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows. See, *e.g.*, *Rueth*, 13 F.3d at 231; *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir. 1985); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979). Thus, if Congress possesses the power to regulate a body of water under the Act, generally this court will conclude that it has in fact done

so. Accordingly, because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the EPA and the Corps to interpret the Act in such a manner. Accord *Leslie Salt I*, 896 F.2d at 360.

SWANCC believes that this conclusion is at odds with the Fourth Circuit's decision in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). *Wilson* involved a challenge to 33 C.F.R. § 328(a)(3), the regulation that defines "waters of the United States" to include all waters "the use, degradation or destruction of which could affect interstate or foreign commerce." The court found the regulation to be an unreasonable interpretation of the Act based on its suspicion that Congress lacks the power to regulate waters that "could" affect interstate or foreign commerce. In our case, however, the question whether Congress may regulate waters based on their *potential* to affect interstate commerce is not presented, because the unchallenged facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat. Thus, we need not, and do not, reach the question of the Corps' jurisdiction over areas that are only potential habitats. Moreover, we note that SWANCC has not attacked 33 C.F.R. § 328(a)(3) here. Instead, it has limited its objections to the propriety of the migratory bird rule as an interpretation of 33 C.F.R. § 328(a)(3).

SWANCC's remaining statutory interpretation argument asks us to find the migratory bird rule unreasonable because it is designed to preserve wildlife rather than water quality. This point overlooks the fact that the Act's stated purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). SWANCC's suggestion that the Corps' jurisdiction must be defined solely by reference to water quality is itself inconsistent with the Act and must be rejected.

IV

Last, SWANCC challenges the migratory bird rule on the ground that it was promulgated in violation of the notice and comment requirements of the APA. See 5 U.S.C. § 553. Our starting point here is with the fact that the APA does not require administrative agencies to follow notice and comment procedures in all situations. Section 553(b)(3)(a) specifically exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from the requirement. In order to succeed on its APA claim, then, SWANCC must convince us that the migratory bird rule is a legislative (also termed "substantive") rule, rather than an interpretive rule or policy statement. See *Metropolitan Sch. Dist. of Wayne Township v. Davila*, 969 F.2d 485, 489-90 (7th Cir. 1992); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566-67 (D.C. Cir. 1984).

That, in our view, it cannot do. We explained the difference between legislative and interpretive rules at some length in *Hoctor v. U.S. Dept. of Agriculture*, 82 F.3d 165 (7th Cir. 1996), where we found that a rule requiring certain wild animal containment fences to be eight feet tall was legislative. The reason for this was straightforward: nothing in the idea of a "secure" containment could tell someone whether 7 1/2 feet, 8 feet, or 8 1/2 feet, would be "secure" enough. The statute in question (the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*) did not impose a duty to build a fence of a certain height. Instead, it authorized the agency to impose a specific obligation that would implement the general statutory goals. Here, the statute itself defines the jurisdictional reach of the Act, and regulations issued under the notice- and-comment procedures have elaborated further upon that definition. There is, following *Hoctor*'s common-sense approach, something to interpret here: the use of the term "waters" and "navigable waters" in 33 U.S.C. §§ 1344(a) and 1362(7), and the specific examples of such waters given in 33 C.F.R. § 328.3(a)(3).

It is also noteworthy that the migratory bird "rule" first made its appearance in the Federal Register publication of the Corps' 1986 recodification of the regulatory definition of "waters of the United States" in 33 C.F.R. § 328(a)(3), when it moved these rules from Part 323 to Part 328 of Title 33 of the Code. See 51 Fed. Reg. 41206, 41217 (1986). The preamble offered several examples of waters that came within the regulatory definition, including those used as habitat for migratory birds, as well as examples of waters that normally would not fall within the definition. This, in our view, was interpretation. Moreover, it is hard to see what would have been different if formal notice-and-comment rulemaking had been used, except perhaps the page of the Federal Register on which this statement appeared. We do not wish to discourage agencies from offering concrete examples of the ways in which their rules will apply, see *Hoctor*, 82 F.3d at 170, and we believe that is all that the Corps and the EPA did here.

The Corps has also argued that SWANCC's challenge to the migratory bird rule comes too late, because SWANCC did not file suit in the district court until December 1994, more than six years after the migratory bird rule was first published. There is a general six-year statute of limitations for civil actions against the United States found in 28 U.S.C. § 2401(a), which applies to lawsuits brought pursuant to the APA. See *Polanco v. United States Drug Enforcement Admin.*, 158 F.3d 647, 652 (2d Cir. 1998); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); see also *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 331 (7th Cir. 1993) (recognizing cases holding same, but not expressly reaching the issue). Even if the fact that the Corps did not raise this argument in the district court does not bar it now from making the argument, we doubt that a party must (or even may) bring an action under the APA before it knows that a regulation may injure it or even be applied to it. Compare *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) (claim under the Federal Tort

Claims Act accrues at the time plaintiff knows of both the existence and cause of his injury). We therefore do not reach the Corps' limitations argument, since it would have no effect on the outcome in light of our resolution of SWANCC's substantive APA challenge.

We conclude that the decision to regulate isolated waters based on their actual use as habitat by migratory birds is within Congress' power under the Commerce Clause, and that it was reasonable for the Corps to interpret the Act as authorizing this regulation. Accordingly, we AFFIRM the judgment of the district court.

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Defendants.

No. 94 C 7489.

United States District Court,
N.D. Illinois,
Eastern Division.

March 25, 1998.

MEMORANDUM OPINION AND ORDER

LINDBERG, District Judge.

This action concerns the future of a 533-acre parcel of real estate owned by plaintiff Solid Waste Agency of Northern Cook County. Defendant United States Army Corps of Engineers asserted regulatory jurisdiction over the property after determining that it contained approximately fifty-five acres of navigable waters as defined by the Clean Water Act. 33 U.S.C. § 1362(7). It then denied plaintiff a permit to develop the property under section 404 of that statute. 33 U.S.C. § 1344(a). Plaintiff sought judicial review of these actions under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"), and the parties filed cross-motions for summary judgment on the issue of jurisdiction. For the reasons below, plaintiff's motion for summary judgment will be denied and defendant's motion for summary judgment will be granted.

I. Factual and Procedural Background

Plaintiff Solid Waste Agency of Northern Cook County ("SWANCC") is a municipal corporation created by

intergovernmental agreement under the laws of Illinois. Plaintiff owns a 533-acre parcel of real estate located in Cook and Kane Counties, which, due to its prior incarnation as a gravel mining pit, contains large surface depressions that now hold rainwater and other precipitation. Plaintiff sought to convert approximately 180 acres of the property into a balefill, a repository for non-hazardous solid waste that cannot be recycled or otherwise removed from the waste stream. The Army Corps of Engineers determined that 17.6 acres of the balefill area contained "navigable waters" as defined by the Clean Water Act, 33 U.S.C. § 1362(7), and it therefore required plaintiff to obtain a permit for the project under section 404(a) of that statute, 33 U.S.C. § 1344(a).

Section 404(a) of the Clean Water Act authorizes the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Clean Water Act defines navigable waters as "the waters of the United States." 33 U.S.C. § 1362(7). By regulation, the Army Corps of Engineers has further defined the phrase "waters of the United States" to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3). In a preamble to this regulation, the Corps has explained that the term "other waters" includes those which "are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,217 (Nov. 13, 1986). For lack of a better term, perhaps, this language in the preamble has been described as the "migratory bird rule."

On March 12, 1986, plaintiff invited the Corps to determine whether its property contained any "apparent wetlands." (R. 34,594.) On April 17, 1986, the Corps indicated that the SWANCC property did not contain any

wetlands or lakes as defined by 33 C.F.R. § 323.2(c) and (e). On February 25, 1987, after acquiring additional land, plaintiff again requested the Corps to indicate whether its property contained any "protected wetlands." (R. 34,598.) On March 4, 1987, the Corps issued a virtually identical letter stating that the property did not contain any wetlands or lakes under 33 C.F.R. §§ 323.2(b) or 328.3(b). In each letter, the agency stated that it did not have jurisdiction over the property and that plaintiff would not need a permit to develop it.

On July 8, 1987, the Illinois Nature Preserves Commission asked the Corps to consider whether the SWANCC property might be subject to federal jurisdiction under 33 C.F.R. § 328.3(a)(3) on the grounds that four different species of migratory birds had been observed there. The agency agreed, and on November 16, 1987 it asserted jurisdiction over the waters on the SWANCC property for the reason that they were used or could be used as a habitat by migratory birds. It explained that its previous denial of jurisdiction "was based on the fact that the water areas did not meet the definition of a wetland or lakes, and not on the broader definition of 'waters of the United States.'" (R. 34,619.) Plaintiff then submitted two successive applications for a section 404(a) permit to begin the balefill project. When those applications were denied, plaintiff filed the instant lawsuit.

The parties have filed cross-motions for partial summary judgment on the issue of whether the Army Corps of Engineers has regulatory jurisdiction over the 17.6 acres of water on the proposed balefill site. A supplemental brief in support of the government's motion was submitted by intervenor-defendants Village of Bartlett and Citizens Against the Balefill. Plaintiff has argued that the Corps lacks jurisdiction because (1) the migratory bird rule exceeds the legislative authority created by the commerce clause, (2) the agency's assertion of jurisdiction over the waters of the

proposed balefill was arbitrary and capricious, (3) the migratory bird rule goes beyond the mandate of the Clean Water Act, and (4) the rule was adopted in violation of the notice and comment requirements of the APA. On May 22, 1997, the court heard oral argument on these issues, and it will now address them in turn.

II. Discussion

A. Commerce Clause

Plaintiff contends that the waters of the proposed balefill site are not subject to federal regulatory jurisdiction under the commerce clause. It argues that the migratory birds on the balefill site do not have any relationship with interstate commerce because they do not support any human commercial activity on the site itself. Noting that the balefill area is closed to the public and is not visible from adjacent properties, plaintiff reasons that it cannot be subject to federal jurisdiction because "[b]irds do not conduct commerce, people do." (Pl.'s S.J. Mem. at 3.) The court must therefore decide whether the commerce clause authorizes the federal government to exercise regulatory jurisdiction over isolated intrastate waters that serve as a habitat for migratory birds.

The Seventh Circuit addressed this very issue in *Hoffman Homes, Inc. v. Administrator, U.S. EPA*, 961 F.2d 1310 (7th Cir. 1992) "*Hoffman Homes I*". In that case, a residential developer was fined after it filled a one-acre pond on its property without a permit. *Id.* at 1311. The EPA had asserted jurisdiction over the pond pursuant to 40 C.F.R. § 230.3(s)(3)[1] after finding that it could be used as a habitat by

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[1] The EPA's definition of "waters of the United States" at 40 C.F.R. § 230.3(s)(3) is identical to that adopted by the Army Corps of Engineers at 33 C.F.R. § 328.3(a). See *Hoffman Homes II*, 999 F.2d at 260.

migratory birds. *Id.* at 1311-1312. The Seventh Circuit held that the EPA had exceeded its authority under the commerce clause by extending jurisdiction over the pond based solely on its potential use as a habitat for migratory birds. *Id.* at 1321-1322. Reasoning that birds do not affect commerce until they are "watched, photographed, shot at or otherwise impacted by the people who do," *id.* at 1320, the court explained that:

> The EPA has provided evidence of only one interstate connection: [The pond] is a potential landing site for migratory birds. Although we recognize that the Commerce Clause power is broad, it has never been extended to reach all areas in (much less those only potentially in) migratory bird flyways. Such an extension, we believe, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. After all, what area of the United States is not a potential landing spot for migratory birds? The Commerce Clause, at the very least, requires some connection to human commercial activity.

Id. at 1321-1322 (citations omitted). In addition to holding that 40 C.F.R. § 230.3(s)(3) was unconstitutional, the court concluded that the regulation went beyond its statutory mandate because the Clean Water Act did not authorize the regulation of isolated intrastate wetlands. *Id.* at 1316.

On rehearing, the court vacated its first opinion and held that 40 C.F.R. § 230.3(s)(3) did not violate the commerce clause. *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 260-261 (7th Cir.1993) (*"Hoffman Homes II"*). The court explained that it was reasonable for the EPA to interpret the regulation as extending its jurisdiction to waters whose connection with interstate commerce was "potential rather than actual, minimal rather than substantial." *Id.* at 261. It further explained that the potential use of wetlands by migratory

birds was sufficient to invoke commerce clause jurisdiction because "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds" and "the cumulative loss of wetlands has reduced populations of many bird species." *Id.* at 261. The court nevertheless ruled in favor of the developer because the EPA had not presented substantial evidence that the water site was a suitable or potential habitat for migratory birds. *Id.* at 261-262.

The Seventh Circuit has not been alone in suggesting that the migratory bird rule is a valid application of federal commerce clause power. In *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir.1990), a company sought to develop a property that contained surface depressions as a result of previous industrial usage. *Id.* at 355-356. The Army Corps of Engineers asserted jurisdiction over the site under 33 C.F.R. § 328.3(a) because the excavations collected water on a seasonal basis and could be used as a habitat for migratory birds. *Id.* at 357, 360. The district court held that the ponds were not "other waters" under 33 C.F.R. § 328.3(a) because they were not of a natural origin and were only seasonally filled. *Leslie Salt Co. v. United States*, 700 F.Supp. 476 (N.D. Cal.1988) (*"Leslie Salt I"*). The Ninth Circuit reversed, explaining that the "commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir.1990) (*"Leslie Salt II"*). When the Court of Appeals remanded the case to the district court to determine whether the ponds could be used as a habitat by migratory birds, the district court found that the property was a seasonal home to more than fifty species of migratory birds and was thus subject to federal commerce clause jurisdiction. *Leslie Salt Co. v. United States*, 820 F.Supp. 478, 480 (N.D. Cal.1992) (*"Leslie Salt III"*). On a second appeal, the Ninth Circuit affirmed this

finding and reiterated that the migratory bird rule was a valid exercise of the federal commerce clause power. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir.1995) (*"Leslie Salt IV"*).

The Tenth Circuit reached a similar result in *Utah v. Marsh*, 740 F.2d 799 (10th Cir.1984). In that case, the Army Corps of Engineers asserted regulatory jurisdiction over an intrastate lake pursuant to a regulation which, like 33 C.F.R. § 328.3(a), conferred administrative authority over isolated wetlands whose degradation or destruction could affect interstate commerce. *Id.* at 802 & n. 4, 803. Plaintiff argued that the lake had no effect on interstate commerce because it was located entirely within the borders of the state. *Id.* at 803. The court explained that the lake was subject to federal commerce clause jurisdiction because, among other things, it was "on the flyway of several species of migratory waterfowl which are protected under international treaties." *Id.* at 804.

These cases establish that the commerce clause authorizes the federal government to regulate isolated intrastate waters that serve as a habitat for migratory birds. The reason for this rule, it seems, is that the cumulative degradation of intrastate waters could have a substantial effect on interstate commercial interests relating to those birds. See *Hoffman Homes II*, 999 F.2d at 261 ("cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds"). Under this rule, a federal agency may assert jurisdiction over intrastate waters even if the destruction of those particular waters will not have a substantial effect on interstate commerce and there is no evidence that migratory birds support human commercial activity there.

There is reason to consider whether this rule remains valid after the recent decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). In that

case, the Supreme Court held that Congress exceeded its commerce clause powers by imposing criminal sanctions on the possession of handguns in local school zones. *Id.* 514 U.S. at 551, discussing 18 U.S.C. § 922(q). The government argued that the prevention of violent crime in local school zones was related to interstate commerce because education promotes a sound national economy, the threat of violence deters interstate travel, and the cost of violent crime is spread to the population as a whole through insurance. *Id.* at 563-564. After surveying the history of commerce clause jurisprudence, the Court explained that the commerce clause authorizes Congress to regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or the persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. *Id.* at 558-559. Deciding that only the last category applied to the statute in question, the Court held that the possession of a gun in a local school zone is not "an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. It further explained that the statute could not be sustained under case law upholding the regulation of activities "that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561. The statute was therefore declared unconstitutional.

The Fourth Circuit has recently suggested that the migratory bird rule is unconstitutional under *Lopez*. In *United States v. Wilson*, 133 F.3d 251 (4th Cir.1997), the appellant was convicted of filling intrastate wetlands without a permit in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(2)(A) and 1311(a). *Id.* at 254. The Army Corps of Engineers had asserted jurisdiction over the fill areas pursuant to 33 C.F.R. § 328.3(a)(3), and the appellant challenged the validity of this regulation under both the Clean Water Act and the commerce clause. Writing for the majority, Judge

Niemeyer stated in dicta and without explanation that the regulation presented "serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause." *Id.* at 257. Writing separately, Judge Luttig declined to adopt this portion of the majority opinion on the grounds that it was based on an overly expansive reading of the commerce clause. See *Wilson*, 133 F.3d at 266 (Luttig, J., dis.).

Respectfully, this court does not agree that *Lopez* places the regulation of intrastate migratory bird habitats beyond the reach of federal commerce clause jurisdiction. It is well established that the commerce clause authorizes the federal government to regulate activities whose effect on interstate commerce is substantial only in the aggregate. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 127-128, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (commerce clause allows regulation of private commercial transactions that have a substantial effect on interstate commerce when "taken together with that of many others" but are otherwise trivial); *Maryland v. Wirtz*, 392 U.S. 183, 197 n. 27, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) ("where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence"); *Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975) (purely intrastate activity may be regulated "where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations"). The Supreme Court expressly affirmed this line of cases in *Lopez*, 514 U.S. at 557, *quoting Wirtz*, 392 U.S. at 197 n. 27. Distinguishing *Wickard* on the facts, the *Lopez* Court held that the criminal statute at issue did not concern activities which might substantially affect interstate commerce through "repetition" or when "viewed in the aggregate." 514 U.S. at 560-561, 567. Thus, while the *Lopez* decision may help to define the outer limits of federal commerce clause jurisdiction, it does not signal a retreat from

the constitutional principles set forth in *Wickard* and its progeny.

The migratory bird rule finds ample support in this line of cases. Migratory birds have long been regarded as a proper subject for federal commerce clause regulation. See *Andrus v. Allard*, 444 U.S. 51, 63 n. 19, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) ("assumption that the national commerce power does not reach migratory wildlife is clearly flawed"); *Hoffman Homes II*, 999 F.2d at 261 ("millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds"); *Cochrane v. United States*, 92 F.2d 623, 627 (7th Cir.1937) (commerce clause allows federal government "to protect the game, nongame, and insectivorous birds which migrate with the changing seasons"). By implication, the power to protect migratory birds extends to the habitats in which they live. While the destruction of a single habitat is unlikely to affect the viability of migratory bird populations, the destruction of numerous such habitats may, in the aggregate, have a substantial affect on their livelihood. *See Hoffman Homes II*, 999 F.2d at 261 (cumulative loss of habitat has reduced the population of many bird species and has impaired the ability of people to hunt, trap, and observe them). On this point, the following analysis is persuasive:

> Isolated wetlands provide habitat to migratory birds whose continued existence supports billions of dollars in interstate commerce. The incremental destruction of migratory bird habitat directly and negatively impacts migratory bird populations and, thereby interstate commerce. Isolated wetlands are a crucial link in the direct chain of causation between healthy migratory bird populations and interstate commerce. It should, therefore, be irrelevant whether a migratory bird is ever observed, photographed, or hunted at the particular isolated wetland in question. Unlike in *Lopez*, the connection of isolated wetlands to interstate commerce is

well-documented and does not require the court to "pile inference upon inference" in a manner that gives rise to a general federal police power.

Lori J. Warner, "The Potential Impact of United States v. Lopez on Environmental Regulations," 7 *Duke Environmental Law & Policy Forum* 321, 354-355 (1997) (citations omitted). For these reasons, the commerce clause authorizes the federal government to regulate isolated intrastate waters that provide a habitat for migratory birds even if the particular birds on the site do not substantially affect interstate commerce.[2]

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[2] The court notes that the issues presented in this section have drawn considerable attention from academics. *See, e.g.*, Elaine Bueschen, "Do Isolated Wetlands Substantially Affect Interstate Commerce?" 46 *Am.U.L.Rev.* 931 (1997); Robert D. Icsman, "Hoffman Homes, Inc. v. Administrator, U.S. EPA: The Seventh Circuit Gets Bogged Down in Wetlands," 54 *Ohio St. L.J.* 809 (1993); Edward Alburo Morrissey, "The Jurisdiction of the Clean Water Act Over Isolated Wetlands: The Migratory Bird Rule," 22 *J. Legis.* 137 (1996); Dennis J. Priolo, "Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands," 30 *Land & Water L.Rev.* 91 (1995); Stephen Jay Stokes, "The Limit of Government's Regulatory Authority Over Non-Adjacent Wetlands: Hoffman Homes, Inc. v. EPA," 15 *Energy L.J.* 137 (1994); Lori J. Warner, "The Potential Impact of United States v. Lopez on Environmental Regulations," 7 *Duke Envtl. L. & Pol'y F.* 321, 354-355 (1997). While some complain that the migratory bird rule could bring every puddle and pond in the nation under the umbrella of federal control, this argument overlooks the fact that the question of federal jurisdiction has a substantial factual component that must be examined on a case-by-case basis. To establish that an intrastate waterway is subject to jurisdiction under the migratory bird rule, an agency must first determine as a factual matter that it bears the distinctive features of a "habitat."

B. Evidentiary Basis for Jurisdiction

Plaintiff argues that the agency's decision to extend jurisdiction over the proposed balefill site was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). It is well established that a final agency decision is entitled to a "presumption of regularity" and that the court must refrain from substituting its own judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The court must uphold the decision so long as it was based on a consideration of the relevant factors and was free from clear errors of judgment. *Id.* 401 U.S. at 416. The burden of persuasion rests on the party seeking to overturn the administrative decision. *Schweiker v. McClure*, 456 U.S. 188, 196, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982). The court must therefore decide whether, based on the entire administrative record, it was reasonable for the Corps to determine that the proposed balefill site was "a suitable or potential habitat for migratory birds." *Hoffman Homes II*, 999 F.2d at 261.

The Army Corps of Engineers initially asserted jurisdiction over the waters of the SWANCC property after learning that four species of migratory birds were observed there by the Illinois Nature Preserves Commission. During the ensuing permit review process, the agency gathered an extensive volume of supplemental information about the avifauna and topography of the site. These included a catalogue of the avian and waterfowl species observed on or near the SWANCC site (R. 2,462-2,469; 40,328-40,358), two lengthy environmental impact reports describing the flora and avifauna of the property and the potential impact of the balefill project (R. 38,636-38,779; 40,409-40,512), and detailed information about specific migratory bird populations on the site (R. 2,428-2,461; 2,329-2,384; 45,885-45,887). The Corps argues that this evidence was more than sufficient

to support its finding that the waters of the SWANCC property were used as a habitat by migratory birds.

Plaintiff offers at least three reasons why the court should hold otherwise. First, plaintiff argues that the agency should have limited its analysis to the 17.6 acres of water in the permit area rather than considering the waters on the property as a whole. Plaintiff suggests that the record contains no evidence that the waters of the permit area itself serve as a habitat for migratory birds. Plaintiff relies on *Hoffman Homes II*, 999 F.2d at 261, where the Seventh Circuit determined that the EPA could not assert jurisdiction over a small pond based on evidence that a nearby but hydrologically dissimilar water area was a suitable habitat for migratory birds. Here, however, plaintiff has not explained how the waters on the balefill site are hydrologically distinct from those of the property as a whole. To the contrary, there is evidence that the SWANCC property is a "large, forested wetland complex" (R. 15,579) which contains an "extensive labyrinth of open water" (R. 40,334). By extending jurisdiction over the entire "labyrinth" of water on the site, the Corps implicitly determined that each component part of that system could serve as a habitat for migratory birds. Because plaintiff presents no evidence that the 17.6 acres of water in the permit area are distinct from those on the rest of the property, it has failed to show that the agency's jurisdictional decision was improper as to the permit site.

Second, plaintiff argues that the permit area should not be subject to federal jurisdiction because it cannot support a viable population of migratory birds.[3] Citing several studies,

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[3] The agency argues that the presence of migratory birds by itself is sufficient to create federal jurisdiction over the waters on the SWANCC property, and the quality of the habitat is only relevant to the permit determination. This overlooks the fact that federal jurisdiction extends only to habitats that are "suitable" for migratory birds. *Hoffman Homes II*, 999 F.2d at 261. The concept of viability is central to the jurisdictional analysis because it distinguishes genuine habitats from the "parking lot puddles" of concern in *Hoffman Homes II*, 999 F.2d at 262. The Supreme Court did not suggest otherwise in *Riverside*, 474 U.S. at 135 n. 9, where it explained that the Army Corps of Engineers has presumptive jurisdiction over all "adjacent wetlands" because most such wetlands have a substantial effect on interstate commerce, and thus the agency need not consider whether any particular wetland has a substantial effect on interstate commerce until the permit process. This analysis is inapposite here because the concept of viability is implicit in the term "habitat," while there is nothing in the term "adjacent wetland" which suggests that it must have a significant effect on interstate waters.

plaintiff predicts that veeries will be unable to breed successfully on its property. It argues that the great blue heron colonies are not subject to federal jurisdiction under the migratory bird rule because the herons nest in trees rather than in the water. Plaintiff also points out that several of the migratory bird species identified on the site between 1988 and 1992 were found only in small numbers or not at all in 1993. Although the Corps raises a number of compelling objections to these arguments, one is dispositive: Plaintiff has not addressed any of the record evidence concerning at least a half dozen migratory bird species that were identified on its property. The fact that the balefill site serves as a habitat to these birds is sufficient to establish agency jurisdiction.

Finally, plaintiff argues that it was unreasonable for the Corps to assert jurisdiction over the property in November of 1987 after it declined to do so in April of 1986 and March of 1987. As an preliminary matter, it is unclear that the agency actually reversed its position. The Corps initially declined to extend jurisdiction over the balefill site for the limited reason that the property did not contain any protected lakes or wetlands. This did not, strictly speaking, rule out the possibility that the property was a habitat for migratory birds.

Even if the Corps changed its position, however, it had sound reasons for doing so. See *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280, 284 (7th Cir.1986) (when an agency changes course, it must give sound reasons for doing so). The agency first learned in July of 1987 that the balefill site was a potential habitat for migratory birds, and it was certainly not obliged to discover that information at an earlier time. It then gathered a substantial volume of information about the topography and avifauna of the SWANCC property. Because all of this information was sufficient to establish agency jurisdiction, any change in the agency's position was not arbitrary. For all of these reasons, the court finds that it was reasonable for the Corps to determine that all of the waters of the SWANCC property were used as a habitat by migratory birds.

C. Clean Water Act

Plaintiff contends that the migratory bird rule goes beyond its statutory mandate because the Clean Water Act only authorizes federal regulations that deal strictly with water quality. The court must defer to an agency's interpretation of its own authorizing statute so long as that interpretation is reasonable and not in conflict with the expressed intent of Congress. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Accordingly, the court must decide whether it was reasonable for the Army Corps of Engineers to interpret the statutory term "waters of the United States" to include intrastate waters that provide a habitat for migratory birds.

The Seventh Circuit arguably resolved this question in *Hoffman Homes II*, 999 F.2d 256. The issue in that case, as defined by the court, was whether it was reasonable for the EPA to construe the term "other waters" in 40 C.F.R. §

230.3(s)(3) to include waters that serve as a habitat for migratory birds. *Id.* at 260. Although the court did not expressly consider whether the regulation was within the scope of the Clean Water Act, it arguably reached the issue by implication. Vacating an earlier decision in which it held that the regulation was beyond its statutory mandate, the court explained that the EPA's interpretation of the regulation was both reasonable and authorized by the commerce clause. *Id.* at 260-261. In light of the fact that the Clean Water Act extends federal jurisdiction to the limits of the commerce clause, this holding virtually implied that the migratory bird rule was consistent with its authorizing statute. *Id.* at 261. It is also apparent that the court could not have reached its decision in the case if the regulation at issue were illegal. Because the Seventh Circuit did not address the issue directly, however, the court will discuss it here.

Both the language and the legislative history of the Clean Water Act suggest that it authorizes the regulation of intrastate migratory bird habitats. The purpose of the statute is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In part, this is necessary to achieve "the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2). Moreover, the statute authorizes the EPA to promulgate regulations in order to protect fish and wildlife. 33 U.S.C. § 1343(c)(1). To the extent that the actual language of the Clean Water Act reveals that Congress intended to protect wildlife, the migratory bird rule would appear to be a permissible construction of that statute.

The legislative history of the Clean Water Act leads to the same conclusion. That history reveals that Congress intended "to extend Clean Water Act jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause." S.Rep. No. 1236, 92nd Cong., 2d Sess. 144 (1972), U.S.C.C.A.N. 1972, at pp. 3668, 3776. The Seventh Circuit has long recognized that Congress intended

to make the Clean Water Act as far-reaching as the commerce clause permits. See *Rueth v. U.S. EPA*, 13 F.3d 227, 231 (7th Cir.1993); *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir.1985); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir.1979). To the extent that the commerce clause authorizes the federal government to regulate intrastate migratory bird habitats, then, the Clean Water Act must as well. For these reasons, the court finds that 33 C.F.R. § 328.3(a)(3), as applied to intrastate migratory bird habitats, is a reasonable construction of the Clean Water Act.

Notably, the Fourth Circuit reached the opposite conclusion in *United States v. Wilson*, 133 F.3d 251 (4th Cir.1997). In that case, the court explained that 33 C.F.R. § 328.3(a)(3) went beyond its statutory mandate because the term "waters of the United States" cannot include intrastate or nonnavigable waters whose degradation or destruction could affect interstate commerce. *Id.* at 256-257. Relying generally on the Supreme Court's decision in *Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626, the majority explained that the phrase "waters of the United States" must refer "to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *Id.* at 257. In a separate opinion, Judge Luttig declined to adopt this portion of the majority opinion on the grounds that it was based on an overly expansive reading of *Lopez*. *Id.* at 266.

This court respectfully declines to follow the majority in *Wilson*. Because the scope of federal regulatory jurisdiction under the Clean Water Act is coextensive with that of the commerce clause, and because the commerce clause authorizes the federal regulation of intrastate migratory bird habitats, the migratory bird rule must be a valid application of the Clean Water Act. For the reasons discussed in Part II.A. of this opinion, the court does not believe that *Lopez* requires a contrary result. On this point, then, the court agrees with the Ninth Circuit that "[t]he commerce clause

power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Leslie Salt II*, 896 F.2d at 360.

D. Administrative Procedure Act

Plaintiff argues that the migratory bird rule was promulgated without public notice and comment in violation of the APA. That statute requires federal agencies to provide notice and an opportunity for public comment before they promulgate or amend administrative regulations, but it creates an exception for interpretive rules and general statements of policy. 5 U.S.C. § 553. An interpretive rule is one in which an agency explains what a statute means or reminds parties of existing duties, while a substantive rule creates altogether new rights or duties. *Metropolitan School Dist. of Wayne Township v. Davila*, 969 F.2d 485, 489-90 (7th Cir.1992); *see also American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C.Cir.1987). Because the parties agree that the migratory bird rule was adopted without notice and comment, the court need only decide whether the rule is substantive or interpretive.

This issue was addressed in *Tabb Lakes, Ltd. v. United States*, 715 F.Supp. 726, 728-729 (E.D. Va.1988). In that case, a landowner sought a declaratory judgment that his property was not subject to federal jurisdiction because it did not contain "other waters" as defined by 33 C.F.R. § 328.3(a)(3). *Id.* at 727. The Army Corps of Engineers argued that it had jurisdiction over the site pursuant to an internal memorandum which explained that the term "other waters" included those which "are used or could be used as habitat by other migratory birds which cross state lines." *Id.* at 728. The district court held that the memorandum was a substantive rule-making because it had a "significant effect on public interests" and was "intended to have the full force and effect of a substantive rule." *Id.* at 728-729. Accordingly,

the court held that the memorandum was adopted in violation of the notice and comment requirements of the APA and did not confer federal jurisdiction over the property in question. *Id.* at 729.

In an unpublished opinion, a divided panel of the Fourth Circuit affirmed this holding without explanation. See *Tabb Lakes, Ltd. v. United States*, 885 F.2d 866 (4th Cir.1989) (per curiam) (text at 1989 WL 106990). In dissent, Judge Hall suggested that the district court had erred by considering the impact of the rule instead of limiting its analysis to the question of whether the memorandum created new rights or duties. *Id.* at *2 (Hall, J., dis.). He reasoned that the memorandum did not give rise to new law because the statutory term "waters of the United States" was intended to have "the broadest possible constitutional interpretation" under the commerce clause, and the memorandum simply identified "what contacts with interstate commerce are sufficient to bring a given wetland within the jurisdictional reach" of that statute. *Id.* at *3.

More recently, the Ninth Circuit discussed this question in *Leslie Salt IV*, 55 F.3d 1388. When the plaintiff first raised this issue on appeal in *Leslie Salt II*, 896 F.2d 354, the court declined to address it and thus held by implication that the rule was procedurally sound. 55 F.3d at 1393. When the court revisited the issue in *Leslie Salt IV*, its review was limited to the question of whether its prior holding was clearly erroneous. *Id.* at 1394. Relying on *Hoffman Homes II*, 999 F.2d at 261, where the Seventh Circuit held that the term "other waters" in both 40 C.F.R. § 230.3(s)(3) and 33 C.F.R. § 328.3(a)(3) could be read to include waters used by migratory birds, the Ninth Circuit reasoned by analogy that the migratory bird rule could be viewed as an interpretation of the Clean Water Act rather than a substantive rule-making. *Leslie Salt IV*, 55 F.3d at 1394. In a somewhat narrow holding, then, the court concluded that it was "plausible" to

construe the migratory bird rule as an interpretation of the Clean Water Act. *Id.*

It is the opinion of this court that the migratory bird rule is interpretive rather than substantive.[4] The Clean Water Act authorizes the EPA and the Army Corps of Engineers to exercise regulatory jurisdiction over the "waters of United States." 33 U.S.C. § 1362(7). Pursuant to this authority, the Army Corps of Engineers adopted a regulation in 1977 which defined the term "navigable waters" to include isolated intrastate waters whose "degradation or destruction could affect interstate commerce." 33 C.F.R. § 323.2(a)(5) (1977), 42 Fed.Reg. 37,144 (July 19, 1977). In 1986, the Corps renumbered this provision as 33 C.F.R. § 328.3(a)(3) but left the substance of the regulation largely unchanged. The "migratory bird rule" appears in the preamble to the 1986 version of the regulations. 51 Fed.Reg. 41,216 (November 13, 1986).

In the preamble, the Corps explained that the purpose of the reorganization was "to clarify the scope of the Section 404 permit program." 51 Fed.Reg. 41,216. Rather than change the existing definitions, it sought to clarify them by putting them in a separate and distinct part of the regulation. 51 Fed.Reg. 41,216-41,217. The agency then explained that the term "waters of the United States" includes those:

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[4] Defendant suggests that the Seventh Circuit addressed this question in *Hoffman Homes II*, 999 F.2d at 261. Although the issue was raised in one of the briefs in that case, the court opted not to address it. (Hearing 5/22/97 Tr. at 29.) Arguably, however, the court ruled on the matter by implication when it held that it was reasonable for the EPA to interpret the term "other waters" in 40 C.F.R. § 230.3(s)(3) to include those used as a habitat for migratory birds. *Hoffman Homes II*, 999 F.2d at 261; see also *Leslie Salt IV*, 55 F.3d at 1393. Because the Seventh Circuit did not offer a complete discussion of the question, however, the court will treat the issue as one of first impression in this circuit.

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endang[illegible]d species; or

d. Used to irrigate crops sold in interstate commerce.

51 Fed.Reg. 41,217. For additional clarification, the agency then listed five examples of waters that are not generally considered to be "waters of the United States." 51 Fed.Reg. 41,217. The agency emphasized that the reorganization was not intended to expand or retract the scope of agency jurisdiction, but rather "to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." 51 Fed.Reg. 41,217.

There are at least two reasons why the preamble was not a substantive rulemaking. First, the agency itself intended for the preamble to be interpretive. See *Davila*, 969 F.2d at 489 (characterization of a rule by an agency is relevant to whether it is substantive or interpretive). The agency expressly stated that it intended to clarify the scope of the existing section 404 permit program rather than to change existing definitions or to expand its jurisdiction. This is corroborated by the structure of the preamble, which sets forth the migratory bird rule in juxtaposition to a list of waters that are not generally considered to be subject to federal regulation.

More importantly, however, the migratory bird rule does not create new legal rights or duties, for it does not expand the jurisdictional reach of the Clean Water Act or the regulations promulgated thereunder. By authorizing the Army Corps of Engineers to regulate the "waters of the United States," the Clean Water Act extended the jurisdiction of these agencies to the outer limits of the commerce clause. *Rueth*, 13 F.3d at 231. Pursuant to this statutory authority,

the Army Corps of Engineers defined the term "navigable waters" to include all intrastate waters whose degradation or destruction could affect interstate commerce. 33 C.F.R. § 328.3(a)(3). In effect, this "catch-all" provision simply reiterates that the jurisdiction of the agency is coextensive with that of the commerce clause. Because the commerce clause permits the Corps to regulate intrastate migratory bird habitats, the bird rule cannot be said to increase the jurisdiction of that agency. Rather than creating new rights or duties, then, the preamble simply clarifies that the regulation of intrastate migratory bird habitats falls within the scope of the agency's commerce clause jurisdiction. Accordingly, the court finds that the migratory bird rule was not subject to the notice and comment requirements of the APA.

On this point, then, the court expressly declines to follow the reasoning of the district court in *Tabb Lakes*, 715 F.Supp. 726. The fact that the bird rule carries the "force and effect of a substantive rule" or has a "significant effect on public interests" does not, as the court in that case reasoned, imply that the rule creates new substantive rights or duties. *Id.* at 728-729. For the reasons described above, the court believes that the better position on this issue is represented by Judge Hall's dissenting opinion in *Tabb Lakes v. U.S.*, 885 F.2d 866 (4th Cir.1989) (per curiam) 1989 WL 106990, at *2 (Hall, J., dis.), and the Ninth Circuit's opinion in *Leslie Salt IV*, 55 F.3d 1388.

III. Conclusion

For the reasons stated above, the court finds that defendant Army Corps of Engineers did not exceed its authority under the commerce clause by extending regulatory jurisdiction over the waters of plaintiff's proposed balefill site pursuant to 33 C.F.R. § 328.3(a)(3); as applied in this case, 33 C.F.R. § 328.3(a)(3) does not exceed its mandate under the Clean Water Act; the extension of regulatory jurisdiction

over the proposed balefill Site was not arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A); and the migratory bird rule set forth at 51 Fed.Reg. 41,217 was exempt from the notice and comment requirements of the APA, 5 U.S.C. § 553.

ORDERED: Defendant's motion for summary judgment is granted; plaintiff's motion for summary judgment is denied.

33 U.S.C. § 1344 Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * *

33 U.S.C. § 1362 Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

33 C.F.R. § 328.3 Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

* * *

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; and

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce.

* * *

51 Fed. Reg. 41206

RULES AND REGULATIONS

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Parts 320, 321, 322, 323, 324, 325, 326, 327, 328, 329 and 330

Final Rule for Regulatory Programs of the Corps of Engineers

Thursday, November 13, 1986

* * *

Section 328.3: Definitions. This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

* * *